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No. 89-628

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

In response to the Brief In Opposition For Respondent National Wildlife Federation (hereinafter Opposition) Petitioners, Mountain States Legal Foundation and the Minerals Exploration Coalition (hereinafter MSLF), respectfully submit the following reply.

I. THIS CASE PRESENTS A CLEARLY FOCUSED ISSUE OF LAW

The Respondent correctly states that the issue in this case is whether the programs and policies of the federal government are justiciable. Opposition at i. As a result, the issue in this case is purely a question of law. Contrary to Respondent's assertion, no factual inquiry is required either: as to the factual sufficiency of the affidavits,[1] Opposition at 19; or as to consideration of the issue of supplementation of Respondent's affidavits, Opposition at 20-22, 10-12.

Clearly, the issue raised in the case at bar – the justiciability of Executive Branch policies and programs – brings to bear the vitally important constitutional question of separation of powers. *Allen v. Wright*, 468 U.S. 737, 759-60 (1984). Despite the importance of the doctrine of separation of powers – it was one of the key building blocks of our Constitution – the Respondent tries to down-play its significance. The Respondent seeks to persuade this Honorable Court that, in essence, the doctrine of separation of powers is an outdated concept from a simpler time that can now be discarded.

Similarly, the Respondent minimizes the burdensomeness of judicial consideration of the merits of this case, which is in reality 814 separate and distinct cases, each with its own set of facts. Opposition at 24. The

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[1] In making this statement, MSLF does not agree that the Court of Appeals was correct in accepting the validity of the Respondent's affidavits in the face of a protective order preventing discovery into the validity of those affidavits. To the contrary, MSLF believes that holding was in error.

Respondent would have this Honorable Court believe that it is of no moment that for 180 million acres of land – an area the size of Texas, Vermont, and New Hampshire – a federal judge would become the federal land manager, deciding as to each of the 814 separate federal actions what should be done with the land in question.

The Respondent argues that the absence of an injunction makes the case minimally burdensome to the agency. Yet, since the dissolution of the injunction in 1988, the Respondent has asked both the District Court and the Court of Appeals to reinstate the injunction. Moreover, it has prayed for a permanent injunction which would have the effect of making the court, rather than the agency, act as manager of the lands. *See* Opposition at 33. This significantly and unconstitutionally burdens both the court and the agency. Clearly, it is this type of burdensomeness that highlights the importance of the doctrine of separation of powers.

II. THE RESPONDENT HAS MISCONSTRUED DECISIONS OF THIS COURT

The Respondent has misconstrued and misapplied this Honorable Court's rule that programs and policies are not justiciable as set forth in *Ashwander v. TVA*, 297 U.S. 288, 324 (1936). The Respondent correctly notes that the broad challenge to the TVA program and policy in *Ashwander* was based on injury associated with a single contract and that this Honorable Court found the broad challenge not justiciable. Opposition at 26.

However, Respondent misapplies *Ashwander* by attempting to distinguish itself from the plaintiff in *Ashwander*. The Respondent would have this Honorable Court believe that the Respondent's attempt to shut down the Withdrawal Review Program is unlike Ashwander's efforts to shut down the TVA program. Opposition at 27-28. The Respondent apparently sees nothing in its programmatic challenge to the entire Withdrawal Review Program that is comparable to *Ashwander's* disallowed programmatic challenge. This is unreasonable and untrue.

To correctly apply *Ashwander*, the injury suffered by Respondent's affiant – Ms. Peterson[2] – must be equated to *Ashwander's* contract injury. In addition, the challenge to the Withdrawal Review Program must be equated to the disallowed programmatic challenge in *Ashwander*. The Respondent could have challenged one of the 814 separate and distinct agency actions by bringing one claim for relief against that single agency action on the basis of Ms. Peterson's affidavit.[3] Instead, the Respondent seeks to do exactly what the plaintiff in *Ashwander* sought to do but was prevented by this Honorable Court from doing: using one injury to gain standing to set aside an entire government program.

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[2] Ms. Peterson's affidavit, by itself, was held sufficient for standing by the Court of Appeals. MSLF Petition, App. 34.

[3] As noted in MSLF's Petition, Ms. Peterson's affidavit relates to only one of 814 unique and separate agency actions listed in the Respondent's Complaint.

The Respondent attempts to distinguish *Ashwander* by asserting that *Ashwander* only precludes litigation where injury is remote and hypothetical. Opposition at 27. The Respondent would have this Honorable Court believe that its alleged injuries are not remote and hypothetical, when in fact that is exactly what they are. There are over eight hundred other agency actions challenged in this suit for which the Respondent has submitted no affidavit documenting any injury whatsoever.[4] Each of these as yet unasserted claims is an example of the remote and hypothetical claims which are barred by the rule of *Ashwander*.

The Respondent misinterprets *Ashwander's* requirement that to be justiciable an agency action must have "fruition in [agency] action of a definite and concrete character." It asserts that the requirement is met and the entire program may be challenged if a plaintiff can merely show implementation of the program. Opposition at 28. If this were true, then the plaintiff in *Ashwander* could have challenged the program by merely presenting its one contract injury and pleading that the TVA program was underway – which no doubt it was. This is not reasonable.

It is also unreasonable to equate – as the Respondent does – the slight injury of Ms. Peterson – or all the Respondent's affiants, for that matter – to the alleged dangers of the breeder reactor demonstration facility considered by the court in *Scientists Institute for Public*

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[4] To show injury from the 814 separate agency actions, Respondent has submitted a total of six affidavits; of which the Court of Appeals considered only Ms. Peterson's.

Information, Inc. v. Atomic Energy Comm'n (SIPI), 481 F.2d 1079 (1973). *See* Opposition at 27. The action complained of by Ms. Peterson is an infinitesimal part of the Withdrawal Review Program, while the breeder reactor demonstration facility of *SIPI* constituted the major part of the LMFBR program and most probably was the reason why the court considered the LMFBR program to be of "definite and concrete character."[5]

The Respondent's interpretation of *Allen v. Wright* is also flawed. It argues that the precedent of *Allen v. Wright*, precluding standing, does not apply since "it makes little sense either for coherent management of the federal lands or for the exigencies of the federal court system to force multiple lawsuits challenging the same violations of the law." Opposition at 30. This argument begs the question before this Honorable Court. Respondent's argument makes sense only if this Honorable Court wishes to uphold 'coherent *judicial* management of the federal lands.' That is precisely the issue of this case – whether federal land management is a power assigned to the Executive and Legislative Branches or to the courts. *Allen v. Wright* does not facilitate efficient judicial administration of an agency program, it precludes judicial administration of the program altogether.

The Respondent cites a number of other cases as examples of adjudication of Executive Branch policies

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[5] By ignoring the role of the demonstration facility in *SIPI*, the Respondent chooses to ignore the character of the LMFBR program and distorts MSLF's argument. *See* Opposition at 27 n20.

and programs. None of these cases directly addressed the issue presented in this case. Some addressed sufficiency of rule-making or adjudication in single decisions which initiated programs,[6] one addressed associational standing,[7] and one addressed mootness.[8]

Respondent's unsupported arguments notwithstanding, this Honorable Court's prior decisions limit the role of courts to review policies and programs of the Executive Branch. The decision of the Court of Appeals conflicts with those decisions.

CONCLUSION

MSLF admits that the courts have had difficulty applying the holding of this Honorable Court in *Allen v. Wright*. The result has been a confusing array of lower court decisions on the issue at bar.[9] This confusion is

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[6] *E.g., Watt v. Energy Action Education Foundation*, 454 U.S. 151 (1981); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988); *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988).

[7] *Automobile Workers v. Brock*, 477 U.S. 274 (1986).

[8] *Blum v. Yaretsky*, 457 U.S. 991 (1982).

[9] One correct application of *Allen v. Wright* was Judge Bork's decision denying standing to the plaintiff in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 807 (D.C. Cir. 1987) (Partially quoted in Opposition at 23 n16). However, even this decision recognized that this Honorable Court had not explicitly addressed this issue:

(Continued on following page)

exactly the reason why this Honorable Court should grant the writ and review the Court of Appeals' decision.

Respectfully submitted,

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> Thus, as in *Allen v. Wright*, a court could not recognize appellants' standing . . . regardless of the factual showing they might have made, without running afoul of the structural principle of separation of powers.
>
> Appellants have therefore failed to establish the requisite causation. But because the Supreme Court has never said explicitly that the separation of powers concept leads it to deny causation where it otherwise might be found if it were a purely factual question, it is appropriate to examine the prudential principles that bear on appellants' standing.

Id. As a result of this uncertainty, the issue at bar is like a reserved question. The instant matter presents the ideal opportunity to address this question.